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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Petition for Declaratory Ruling and) RM No. 9345
Rulemaking With Respect to Defining,)
Predicting and Measuring "Grade B)
Intensity" for Purposes of the)
Satellite Home Viewer Act)

**COMMENTS ON THE PETITION FOR DECLARATORY RULING AND/OR
RULEMAKING OF ECHOSTAR COMMUNICATIONS CORPORATION**

The Satellite Broadcasting & Communications Association ("SBCA") submits these comments in support of the Petition for Declaratory Ruling and/or Rulemaking filed with the Federal Communications Commission ("FCC" or "Commission") by EchoStar Communications Corporation ("EchoStar") on August 18, 1998 ("EchoStar Petition"). As discussed more fully below, SBCA agrees with EchoStar that the Commission should develop a model for predicting and measuring a signal of Grade B intensity for purposes of the Satellite Home Viewer Act ("SHVA"). Absent expeditious Commission action on this issue, as many as a million current satellite subscribers could have their access to certain network television services terminated, despite the fact that they cannot receive an adequate over-the-air signal. Such a result will deprive consumers of a choice between cable and satellite-delivered programming and likely drive those consumers into the arms of cable operators. This, in turn, will hamper the Commission's efforts to break the cable

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industry's monopoly over the multichannel video programming distribution ("MVPD") market¹ and reduce cable rates by fostering competition in that market.

BACKGROUND

The EchoStar Petition is the second petition filed with the Commission urging the Commission to address the problems associated with the measurement of "an over-the-air signal of grade B intensity" for purposes of identifying "unserved households" under the SHVA. In July, the National Rural Telecommunications Cooperative ("NRTC") filed an Emergency Petition for Rulemaking ("NRTC Petition") asking the Commission to address this issue on an expedited basis. SBCA filed comments in support of the NRTC Petition, and similarly supports the EchoStar Petition. The fact that two separate petitions were filed seeking Commission action illustrates the significant nature of the controversy concerning the use of the current definition of a Grade B signal for SHVA purposes.

As the EchoStar Petition correctly points out, the litigation concerning the controversy further illustrates the need for expeditious Commission action. There are now two separate court decisions finding satellite operators in violation of the SHVA.² The courts that issued those decisions, however, have applied the Grade B signal intensity standard inconsistently. A federal district court in Florida has endorsed a variation of the Longley-Rice methodology for purposes of enforcing its injunction

¹ According to the National Cable Television Association, the cable industry's share of the MVPD market exceeds 84 percent. *See* Comments of the National Cable Television Association, CS Docket No. 98-102 (July 31, 1998) at 6.

² *See CBS Inc. v. PrimeTime 24 Joint Venture*, No. 96-3650-CIV-NESBITT (S.D. Fla. May 13, 1998) ("Florida Order"); *ABC, Inc. v. PrimeTime 24, Joint Venture*, Memorandum Opinion, Civil Action No. 1:97CV00090 (M.D.N.C. July 16, 1998).

against satellite operator PrimeTime 24,³ which would result in an estimated 700,000 - 1 million subscribers having their satellite service terminated.⁴ A federal district court in North Carolina, however, enjoined PrimeTime 24 from retransmitting network signals “within WTVD’s predicted Grade B contour,”⁵ an area the court determined to be “a circular area with a radius of 75 miles emanating from the base of WTVD’s transmitting tower.”⁶ The North Carolina court thus used the Commission’s standard predictive methodology rather than the Longley-Rice methodology used by the Florida court. The fact that the two injunctions incorporate different methods for determining Grade B signal intensity is sure to cause additional confusion and likely will result in even more subscribers losing their access to network signals.

As Chairman Kennard has stated in responding to concerns expressed by members of Congress about the impact of the Florida court’s decision, however, “[t]his is an impending ‘train wreck’ that need not occur.”⁷ For the reasons cited in the EchoStar Petition, as well as the NRTC Petition, the Commission can -- and should -- take prompt action to initiate a rulemaking proceeding to refine the definition of a Grade B signal for purposes of the SHVA.

³ See Florida Order at 34-35.

⁴ Letter from William E. Kennard, Chairman, Federal Communications Commission, to the Honorable John McCain, United States Senate, and the Honorable Tom Bliley, United States House of Representatives (Sept. 4, 1998) at 2 (“Kennard Letter”).

⁵ *ABC, Inc. v. PrimeTime 24, Joint Venture*, Memorandum Opinion, Civil Action No. 1:97CV00090 (M.D.N.C. Aug. 19, 1998) at 30.

⁶ *ABC, Inc. v. PrimeTime 24 Joint Venture*, Order, Judgment, and Permanent Injunction, Civil Action No. 1-97CV00090 (M.D.N.C. Aug. 19, 1998) at 2.

⁷ Kennard Letter at 1.

I. ECHOSTAR CORRECTLY STATES THAT THE COMMISSION HAS THE JURISDICTION TO ADDRESS THE GRADE B ISSUE

As EchoStar correctly asserts,⁸ the Commission has the jurisdiction to predict and measure Grade B intensity for purposes of the SHVA. Clearly, Congress intended to defer to the expertise of the agency when it expressly stated in the SHVA that an “unserved household” is one that, in part, “cannot receive . . . an over-the-air signal of grade B intensity (*as defined by the Federal Communications Commission*) of a primary network station affiliated with that network.”⁹

EchoStar completely refutes the assertion of the National Association of Broadcasters (“NAB”) that the words “as defined by the Federal Communications Commission” refer to a definition that is frozen at the time the statute is adopted and that, therefore, the Commission cannot now alter that definition. The Supreme Court precedent cited by EchoStar clearly undermines the NAB’s assertion.¹⁰ Moreover, as EchoStar accurately states, “if Congress had intended to freeze in place a given administrative interpretation, it could have simply added a definition of ‘Grade B intensity’ into the definitions section and repeated verbatim whatever interpretation it chose from the agency’s regulation or precedent.”¹¹ The fact that Congress did not do so further undermines NAB’s contention.

⁸ EchoStar Petition at 8.

⁹ 17 U.S.C. § 119(d)(10)(A) (*emphasis added*).

¹⁰ *See* EchoStar Petition at 8-9 (citing *Lukhard v. Reed*, 481 U.S. 368 (1987)). EchoStar also correctly points out that the cases cited by the NAB in support of its assertion are inapposite because they refer to statutory references to other statutes rather than to regulations. *Id.* at 9.

¹¹ *Id.*

Because the Grade B signal standard originally was developed by the Commission, and because only the Commission, as opposed to the Copyright Office or Congress, has the special expertise concerning this highly technical standard, the Commission logically is the entity that should refine the standard for purposes of the SHVA. For the reasons cited above and in the EchoStar Petition, there is no jurisdictional barrier to the Commission taking such action.

II. ECHOSTAR CORRECTLY STATES THAT THERE IS NO APPLICABLE METHOD FOR MEASURING A GRADE B INTENSITY SIGNAL FOR PURPOSES OF THE SHVA

EchoStar correctly states in its petition that “the SHVA [does not] specify any particular methodology for measuring signal strength.”¹² Although the Commission, in its rules, provides methodologies for predicting signal intensity, those methodologies, EchoStar accurately notes, “were established for entirely different purposes and are specifically limited in application to those limited purposes.”¹³ Thus, although the Grade B intensity measurement is meant to identify an area wherein 50 percent of households would receive a signal strength of 47 dB 50 percent of the time, the methods used by the Commission to determine that area are not applicable for purposes of the SHVA. Rather, as specifically stated in the Commission’s rules, those methods are to be used

- (1) In the estimation of coverage resulting from the selection of a particular transmitter site by an applicant for a TV station.
- (2) In connection with problems arising out of application of § 73.3555 [the multiple ownership rules].

¹² *Id.* at 12.

¹³ *Id.* at 13. *See* 47 C.F.R. § 73.684(b) (“Predictions of coverage shall be made only for the same purposes as relate to the use of field strength contours as specified in § 73.683(c).”).

- (3) In determining compliance with § 73.685(a) concerning the minimum field strength to be provided over the principal community to be served.¹⁴

The Florida court, in issuing its injunction, mandated the use of the Longley-Rice predictive model. As EchoStar points out, however, the Commission previously has allowed reliance on the Longley-Rice methodology only in certain limited circumstances.¹⁵ Thus, EchoStar correctly notes that “the Longley-Rice model is not a predictive model universally accepted for all purposes and certainly cannot be applied for purposes of the ‘unserved households’ restriction unless the Commission considers its appropriateness for those purposes.”¹⁶ Moreover, EchoStar further points out that the Commission’s previous reliance on Longley-Rice was for purposes of avoiding interference between television stations and the methodology therefore was designed to achieve an over-inclusive area.¹⁷ Because this consideration is not present with respect to the SHVA, the Longley-Rice methodology may not be appropriate for purposes of that statute.

The Commission, therefore, should initiate a rulemaking to develop an appropriate methodology for measuring a signal of Grade B intensity for purposes of the SHVA. In doing so, the Commission should solicit and consider the views of others, including engineering, mapping, geocoding and statistical experts, in attempting to develop an appropriate methodology. Such a methodology should be easy and

¹⁴ 47 C.F.R. § 73.683(c).

¹⁵ EchoStar Petition at 14-17.

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 19.

inexpensive to administer and should identify accurately those consumers who cannot receive a viewable television signal.

III. THE COMMISSION SHOULD REVISE THE ACTUAL GRADE B MEASUREMENT FOR PURPOSES OF THE SHVA

As noted above, the Commission's current Grade B signal intensity standard is meant to identify an area wherein 50 percent of the households receive a signal strength of 47 dB 50 percent of the time. As EchoStar correctly points out, while the use of such low probabilities makes sense in the context of avoiding interference, they make little sense for purposes of the SHVA.¹⁸ These probabilities mean that, within the identified area, 50 percent of the households will be ineligible to receive satellite delivered network signals *even though those households are unable to receive an acceptable over-the-air signal*. Moreover, even those 50 percent of households that receive an acceptable signal only do so 50 percent of the time under the current measurement. The average viewer likely would consider the ability to receive an adequate signal only 50 percent of the time as tantamount to not receiving the signal at all.

Clearly, Congress did not intend to adopt a measurement that effectively prohibits a significant number of households from receiving satellite signals even though they are unable to receive an adequate over-the-air signal. Such a result is unfair and fails to serve any legitimate legislative purpose. The Commission, therefore, should refine the Grade B measurement to achieve a more realistic reception standard for purposes of the

¹⁸ *Id.* at 23-26.

SHVA -- *i.e.*, one that would allow any consumers who cannot receive an adequate over-the-air network signal to receive satellite-delivered network signals. To be sure, the use of a predictive coverage area inevitably will mean that some households will be deemed “served” even though they cannot in fact receive an acceptable over-the-air signal. The Commission’s goal in refining the current Grade B standard for purposes of the SHVA, however, should be to minimize to the greatest degree the number of households that will fall into this category.¹⁹

IV. BY REFINING THE GRADE B STANDARD FOR PURPOSES OF THE SHVA, THE COMMISSION WILL PROMOTE COMPETITION

Both the EchoStar Petition and the NRTC Petition cogently describe how the current Grade B signal standard is unworkable for purposes of the SHVA and why the Commission is the appropriate entity to tackle the problem from a standpoint of technical expertise. There is a compelling reason why the Commission should address this problem from a policy standpoint as well, however. As explained in SBCA’s comments in response to the NRTC Petition,²⁰ the Commission should refine the current Grade B standard because doing so will further an important Commission goal. Specifically, by refining the Grade B standard, the Commission will promote the long-awaited development of satellite television as a viable competitor to cable television.

As explained in SBCA’s previous comments, the current Grade B standard operates to disadvantage satellite operators vis-à-vis cable operators by preventing

¹⁹ In addition, the Commission must permit any presumptions concerning “served” households to be rebutted upon a proper showing to ensure that all U.S. households can receive network service.

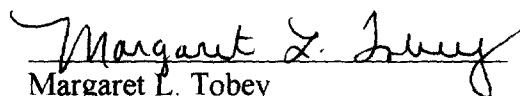
²⁰ See Comments of the Satellite Broadcasting & Communications Association on the Emergency Petition for Rulemaking of the National Rural Telecommunications Cooperative, RM Docket No. 9335 (July 22, 1998).

satellite operators from serving numerous consumers who cannot receive an adequate over-the-air signal. If these consumers wish to watch network television, they currently have no choice but to subscribe to cable. This result is contrary to the Commission's procompetitive policies. Accordingly, the Commission should refine the Grade B signal standard to allow consumers who cannot receive over-the-air network television signals the choice of receiving them via cable or satellite.

CONCLUSION

For the reasons set forth above, the Commission should initiate expeditiously a rulemaking proceeding to refine the definition of a Grade B signal for purposes of the SHVA.

Respectfully submitted,



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September 25, 1998

CERTIFICATE OF SERVICE

I, James S. Bucholz, do hereby certify that the foregoing **COMMENTS ON THE PETITION FOR DECLARATORY RULING AND/OR RULEMAKING OF ECHOSTAR COMMUNICATIONS CORPORATION** were delivered, via hand delivery (except where otherwise noted) on this 25th day of September, 1998, to the following:

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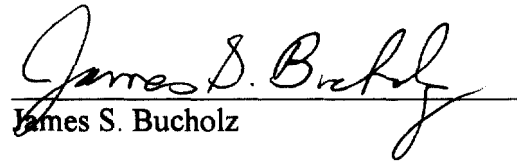
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